

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH PACKNETT, ) No. C 08-02517 JF (PR)  
Plaintiff, ) ORDER OF PARTIAL DISMISSAL  
vs. ) AND OF SERVICE; DIRECTING  
S. PATRAKIS, et al., ) DEFENDANTS TO FILE  
Defendants. ) DISPOSITIVE MOTION OR  
                      ) NOTICE REGARDING SUCH  
                      ) MOTION; INSTRUCTIONS TO  
                      ) CLERK  
\_\_\_\_\_ )

Plaintiff, a California prisoner incarcerated at the San Quentin State Prison (“SQSP”), filed in pro se the instant civil rights action pursuant to 42 U.S.C. § 1983 against SQSP prison officials. Plaintiff has paid the full filing fee. The Court will dismiss two of Plaintiff’s five claims because they fail to state a cognizable basis for relief, and order service of the complaint based on Plaintiff’s remaining cognizable claims.

**DISCUSSION**

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

1 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify  
 2 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a  
 3 claim upon which relief may be granted or seek monetary relief from a defendant who is  
 4 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be  
 5 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
 6 1988).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
 8 elements: (1) that a right secured by the Constitution or laws of the United States was  
 9 violated, and (2) that the alleged violation was committed by a person acting under the  
 10 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

11 B. Plaintiff's Claims

12 Plaintiff is a “Type II Insulin Dependent Diabetic” and receives insulin shots twice  
 13 a day. (Id.) Plaintiff alleges that he is also inflicted with “Kidney Insufficiency; Chronic  
 14 Asthma & Significant Hypertension; Angina; Major Depressive Disorder with Psychotic  
 15 features.” (Id.) Plaintiff alleges that on or about October 25, 2006, methadone  
 16 medication was stolen from the North Block Nursing Station. (Compl. 5.) Not long  
 17 afterward, the culprit turned himself in but failed to return all of the missing pills. (Id.) A  
 18 total lock down and complete search of the building and cells was ordered and initiated.  
 19 (Id.) On October 26, 2006, the ongoing cell search caused a five hour delay before the  
 20 prisoners in first tier of North Block, including Plaintiff, were released to the “chow hall.”  
 21 (Id. at 7.) Plaintiff alleges that he had to spend another four to five hours in the chow  
 22 hall, where it was extremely cold and he was forced to stand more than he was able to sit.  
 23 (Id.) Then on October 27, 2006, after a body search, Plaintiff discovered swelling of his  
 24 “lower calve, [sic] shin and feet area.” (Id.) He was not able to see a physician until  
 25 October 30, 2006, at which time he was admitted to Marin General Hospital and  
 26 diagnosed with “congestive heart failure,” “elevated hypertension and blood sugar.” (Id.  
 27 at 8-9.) Plaintiff alleges that the denial of food for five hours caused his “kethacide  
 28 reaction.” (Id. at 9.)

1 Plaintiff alleges the following claims: 1) prison officials violated due process in  
 2 conspiring to “inflict massive group punishment and purposeful retaliation” because the  
 3 search of North Block was nothing more than “an exercise of uncontrollable rampage and  
 4 destruction of property, en masse,” (Compl. 15); 2) SQSP officials acted with deliberate  
 5 indifference to his serious medical needs as a diabetic, (Compl. 16); 3) SQSP conspired to  
 6 deprive and interfere with his civil rights; 4) SQSP officials were negligent in preventing  
 7 the conspiracy; and 5) SQSP officials acted with deliberate indifference to the serious  
 8 medical needs of a class of diabetic prisoners. Liberally construed, claims 1, 2 and 3 are  
 9 cognizable under § 1983.

10 Plaintiff’s claim 4 fails to state a claim because neither negligence nor gross  
 11 negligence is actionable under § 1983 in the prison context. See Farmer v. Brennan, 511  
 12 U.S. 825, 835-36 & n.4 (1994); Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.  
 13 1990) (gross negligence insufficient to state claim for denial of medical needs to  
 14 prisoner).

15 Plaintiff’s claim 5 is dismissed because the action cannot proceed as a class action  
 16 under Griffin v. Smith, 493 F. Supp. 129, 131 (W.D.N.Y. 1980) (denying class  
 17 certification on basis that pro se prisoner cannot adequately represent class).

## 19 CONCLUSION

20 For the reasons stated above, the Court orders as follows:

21 1. The Clerk of the Court shall issue summons and the United States Marshal  
 22 shall serve, without prepayment of fees, a copy of the complaint in this matter, all  
 23 attachments thereto, and a copy of this order upon **S. J. Mendoza, S. Patrakis, R. Fox,**  
**M. Iannone, Robert Ayers, Jr., and N. Grannis at San Quentin State Prison.** The  
 24 Clerk shall also mail courtesy copies of the Complaint and this order to the California  
 25 Attorney General’s Office.

26 2. No later than **sixty (60) days** from the date of this order, Defendants shall  
 27 file a motion for summary judgment or other dispositive motion with respect to the claim

1 in the complaint found to be cognizable above.

2           a. If Defendants elect to file a motion to dismiss on the grounds that  
 3 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.  
 4 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to  
 5 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.  
 6 Terhune, 540 U.S. 810 (2003).

7           b. Any motion for summary judgment shall be supported by adequate  
 8 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
 9 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**  
 10 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**  
 11 **the opinion that this case cannot be resolved by summary judgment, he shall so**  
 12 **inform the Court prior to the date the summary judgment motion is due.**

13       3. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
 14 and served on Defendants no later than **thirty (30) days** from the date Defendants'  
 15 motion is filed.

16           a. In the event Defendants file an unenumerated motion to dismiss  
 17 under Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

18           The Defendants have made a motion to dismiss pursuant to Rule  
 19 12(b) of the Federal Rules of Civil Procedure, on the ground you have not  
 20 exhausted your administrative remedies. The motion will, if granted, result  
 21 in the dismissal of your case. When a party you are suing makes a motion  
 22 to dismiss for failure to exhaust, and that motion is properly supported by  
 23 declarations (or other sworn testimony) and/or documents, you may not  
 24 simply rely on what your complaint says. Instead, you must set out specific  
 25 facts in declarations, depositions, answers to interrogatories, or documents,  
 26 that contradict the facts shown in the Defendant's declarations and  
 27 documents and show that you have in fact exhausted your claims. If you do  
 28 not submit your own evidence in opposition, the motion to dismiss, if  
 appropriate, may be granted and the case dismissed.

24           b. In the event Defendants file a motion for summary judgment, the  
 25 Ninth Circuit has held that the following notice should be given to Plaintiffs:

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27           <sup>1</sup>The following notice is adapted from the summary judgment notice to be given to pro se  
 28 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1           The defendants have made a motion for summary judgment by  
 2 which they seek to have your case dismissed. A motion for summary  
 3 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if  
 4 granted, end your case.

5           Rule 56 tells you what you must do in order to oppose a motion for  
 6 summary judgment. Generally, summary judgment must be granted when  
 7 there is no genuine issue of material fact--that is, if there is no real dispute  
 8 about any fact that would affect the result of your case, the party who asked  
 9 for summary judgment is entitled to judgment as a matter of law, which will  
 10 end your case. When a party you are suing makes a motion for summary  
 11 judgment that is properly supported by declarations (or other sworn  
 12 testimony), you cannot simply rely on what your complaint says. Instead,  
 13 you must set out specific facts in declarations, depositions, answers to  
 14 interrogatories, or authenticated documents, as provided in Rule 56(e), that  
 15 contradict the facts shown in the defendants' declarations and documents  
 16 and show that there is a genuine issue of material fact for trial. If you do  
 17 not submit your own evidence in opposition, summary judgment, if  
 18 appropriate, may be entered against you. If summary judgment is granted  
 19 in favor of defendants, your case will be dismissed and there will be no  
 20 trial.

21           See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
 22 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477  
 23 U.S. 317 (1986) (holding party opposing summary judgment must come forward with  
 24 evidence showing triable issues of material fact on every essential element of his claim).  
 25 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary  
 26 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and  
 27 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,  
 28 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

20           4. Defendants shall file a reply brief no later than **fifteen (15) days** after  
 21 Plaintiff's opposition is filed.

22           5. The motion shall be deemed submitted as of the date the reply brief is due.  
 23 No hearing will be held on the motion unless the Court so orders at a later date.

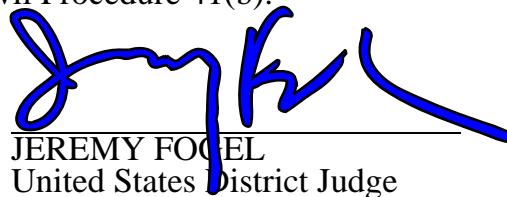
24           6. All communications by the Plaintiff with the Court must be served on  
 25 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true  
 26 copy of the document to Defendants or Defendants' counsel.

27           7. Discovery may be taken in accordance with the Federal Rules of Civil  
 28 Procedure. No further Court order is required before the parties may conduct discovery.

1       8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
2 Court informed of any change of address and must comply with the Court's orders in a  
3 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
4 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

5       IT IS SO ORDERED.

6       DATED: 8/21/08



JEREMY FOGEL  
United States District Judge

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